

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

84 Lumber Company, Limited Partnership,
HONORABLE JUDGE ROBERT A. BLAESER
CLERK

Plaintiff,

v.

Latterell Builders, Inc., et al.,

Defendants,

and

Midwest Asphalt Corporation,

Additional Defendant and
Third-Party Plaintiff,

v.

Epic Development XII, LLC; et al.,

Third-Party Defendants.

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Court File No. 27CV08-20772

The above-entitled matter came before the Honorable Robert A. Blaeser, Judge of Hennepin County District Court, on April 22, 2009 on Defendant SCC Funding I, LLC's motion for partial summary judgment.

Bradley N. Beisel, Esq., appeared for and on behalf of SCC Funding I, LLC.

Jesse R. Orman, Esq. appeared for and on behalf of 84 Lumber Company, Limited Partnership.

Robert C. Black III, Esq. appeared for and on behalf of Carnahan Citywide Insulation, Inc.

Based upon all files, records, and proceedings herein, together with the arguments of the parties, the Court hereby makes the following:

FINDINGS OF FACT

1. This motion seeks to establish that priority of four mechanics liens¹ recorded against three lots located in Hennepin County. Defendants SCC Funding I, LLC ("SCC"), and David G. Hellmuth as assignee of Third-Party Defendant 21st Century Bank ("Hellmuth") seek determination that the four mechanics liens are junior and subordinate to construction mortgages that were recorded against the lots. The lots in question are legally described as follows:

Lot 2, Block 1, Prairie Pines, Hennepin County, Minnesota ("Lot 2").
 Lot 6, Block 1, Prairie Pines, Hennepin County, Minnesota ("Lot 6").
 Lot 7, Block 1, Prairie Pines, Hennepin County, Minnesota ("Lot 7").

2. The face of the four mechanics lien statements reveals the following:

<u>Lien Claimant</u>	<u>Amount</u>	<u>1st date of labor or material provided</u>	<u>last date of labor or material provided</u>	<u>Doc. No. of mechanics lien statement</u>	<u>Legal description of property liened</u>
84 Lumber Company	\$96,124.50	6.19.07	10.19.07	4443327	Lot 2,
84 Lumber Company	\$127,290.51	6.21.07	9.6.07	4443328	Lot 6,
84 Lumber Company	\$72,030.56	5.23.07	8.31.07	4443329	Lot 7,
Citywide Insulation	\$6,841.00	8.21.07	2.29.08	4475757	Lot 2,

3. The construction mortgages are as follows:

Lot 2	Mortgage given by Latterell Builders, Inc., to Source Construction Capital, LLC, in the original principal amount of \$531,000.00, dated March 27, 2007 and filed March 30, 2007 with Hennepin County Registrar of Titles as document number 4371902. Foreclosed by advertisement on February 26, 2009 subject to a six month redemption period.
Lot 6	Mortgage given by Latterell Builders, Inc., to Source Construction Capital, LLC, in the original principal amount of \$551,000.00, dated March 27, 2007 and filed March 30, 2007 with Hennepin County Registrar of Titles as document number 4371907. Foreclosed by advertisement on February 26, 2009 subject to a six month redemption period.

¹ The summary judgment motion was originally directed to a mechanics lien filed by Midwest Asphalt Corporation, but was revised to eliminate Midwest Asphalt corporation from the motion.

Lot 7	Mortgage given by Latterell Builders, Inc., to Source Construction Capital, LLC, in the original principal amount of \$536,000.00, dated March 27, 2007 and filed March 30, 2007 with Hennepin County Registrar of Titles as document number 4371909. Foreclosed by voluntary foreclosure on October 6, 2008, without redemption.
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- The improvements to which the mechanics lien claimants contributed were houses constructed on the three lots in question.
- Building permits were issued for the construction of houses on the three lots as follows:

Lot 2	The building permit for new construction on Lot 2 was applied for on April 26, 2007 and was issued by the City of Eden Prairie ("Eden Prairie") on May 15, 2007.
Lot 6	The building permit for new construction on Lot 6 was applied for on April 19, 2007 and was issued by Eden Prairie on May 17, 2007.
Lot 7	The building permit for new construction on Lot 7 was applied for on April 19, 2007 and was issued by Eden Prairie on May 8, 2007.

- Priority inspections were done on behalf of the lender after the recording of each of the three mortgages. The affidavits and photographs indicate no visible start of construction of a house on any of the three lots as of March 30, the date of the recording of the mortgages.
- Neither Plaintiff 84 Lumber Company, Limited Partnership ("84 Lumber") nor Defendant Carnahan Citywide Insulation, Inc. ("Citywide Insulation") identified any evidence tending to suggest that the start of construction of the houses on any of the three lots started prior to March 30, the date of the recording of the mortgages.
- Neither grading of the streets in the Prairie Pines subdivision, nor the placement of utility stubs on or near the three lots in question, nor the placement of building pads on the three lots in question constitute the visible commencement of the construction of the houses on those lots.
- It appears from the facts not in dispute that the initial land clearing and paving work in the development was distinct and separate from the later construction of the new dwellings at issue in this case.

CONCLUSIONS OF LAW

- Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law." Minn. R. Civ. P. 56.03. In a summary judgment motion, evidence is viewed in a light most favorable to the non-moving party. *Offerdahl v. Univ. of Minn. Hosps. & Clinics*, 426 N.W.2d 425, 427 (Minn. 1988). However, "an adverse party may

not rest upon the mere averments or denial of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial." Minn. R. Civ. P. 56.05. A court may grant a motion for summary judgment when reasonable persons may not draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citation omitted).

2. Lien priority between mortgagees and mechanic's lien claimants is governed by Minn. Stat. 514.05. This section provides that "[a]s against a bona fide purchaser, mortgagee, or encumbrancer without actual or record notice, no lien shall attach prior to the actual and visible beginning of the improvement on the ground." Minn. Stat. § 514.05, subd. 1. The statute further states that "[v]isible staking, engineering, land surveying, and soil testing services do not constitute the actual and visible beginning of the improvement on the ground referred to in this section." *Id.* at subd. 2. This statutory scheme is intended to protect prior mortgagees. *Home Lumber Co. v. Kopfman Homes, Inc.*, 535 N.W.2d 302, 304 (Minn. 1995).
3. Where a mechanic's lien claimant's work started after a mortgage was recorded, the lien claimant has the burden of proving that some other work occurred before the mortgage recording if the lien claimant is to be found to have priority. *R.B. Thompson, Jr., Lumber Co. v. Windsor Development Corp.*, 374 N.W.2d 493, 497 (Minn. Ct. App. 1985), *review denied*. Mere knowledge of planned improvements is insufficient to charge a mortgagee with notice of existing mechanic's liens. *Carlson-Greife Constr., Inc. v. Rosemount Condo. Group P'ship*, 474 N.W. 2d 405, 409 (Minn. Ct. App. 1991), *review denied*.
4. The grading of the streets in the Prairie Pines subdivision, and the placement of utility stubs on or near the three lots in questions, and the placement of building pads on the three lots in question may have occurred before prior to March 30, the date of the recording of the mortgages, however those improvements were subdivision improvements and were separate and distinct from the improvements to which 84 Lumber and Citywide Insulation contributed, namely the construction of houses on the three lots in question. See *E.H. Renner & Sons, Inc. v. Sherburne Homes, Inc.*, 458 N.W.2d 177 (Minn. Ct. App. 1990) (paving of subdivision streets, curbs, and gutters did not constitute the actual visible beginning of improvement for later construction of dwellings in the subdivision and lumber company was not allowed to relate back to the start date of paving work for the subdivision streets).
5. The mechanics liens of 84 Lumber and Citywide Insulation that were recorded against Lots 2, 6, and 7, Prairie Pines, Hennepin County, Minnesota attached some time after March 30, 2007 and are thus junior and subordinate to the mortgages that were recorded against those lots by SCC Funding I.

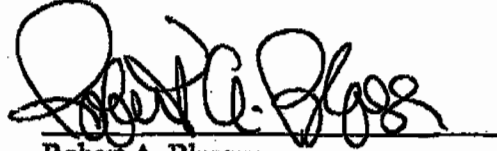
IT IS HEREBY ORDERED:

1. Defendant SCC Funding I, LLC's motion for partial summary judgment is **GRANTED** for the following lots:

Lot 2, Block 1, Prairie Pines, Hennepin County, Minnesota ("Lot 2").
Lot 6, Block 1, Prairie Pines, Hennepin County, Minnesota ("Lot 6").
Lot 7, Block 1, Prairie Pines, Hennepin County, Minnesota ("Lot 7").

2. The construction mortgages recorded by SCC Funding I, LLC are prior and superior to any mechanics liens of 84 Lumber Company, Limited Partnership and Carnahan Citywide Insulation, Inc. on Lot 2, Lot 6, and Lot 7.

Dated: June 1, 2009



Robert A. Blaeser
Judge of District Court
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